Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Respondent.

On Petition For Writ Of Certiorari
To The District Court Of Appeal Of Florida
For The First District

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CONSENT OF THE PARTIES

Petitioner, Silvia S. Ibanez, and Respondent, State of Florida, Department of Professional Regulation, Board of Accountancy, have consented to the participation of the American Association of Attorney-Certified Public Accountants, Inc. in these proceedings as amicus curiae in support of the petition for writ of certiorari. Their consents have been filed with this Court.

INTEREST OF AMICUS CURIAE

The American Association of Attorney-Certified Public Accountants, Inc. ("AAA-CPA" or "the Association") is a not-for-profit corporation, formed in 1964 and now headquartered in California, with members located all over the United States. Every member has been licensed as both an attorney and a certified public accountant ("CPA").

AAA-CPA is dedicated to ensuring that its members observe the highest professional and ethical standards in service to their clients and the public. At the same time, AAA-CPA supports the right of practitioners to disclose truthful information about their qualifications, and to engage in the practice of either or both of their professions.

AAA-CPA is active in advocating the rights of individuals, such as its members, who are dually licensed both as attorneys and as CPAs. The Association asserts the right of these individuals to identify themselves as being licensed to practice both professions, and to engage in the practice of either or both, provided these individuals comply with the applicable standards of professional conduct.

AAA-CPA is in a unique position to appreciate the differences between the professional duties of attorneys on the one hand, and CPAs on the other. Because of these differences in professional duties, the state has a legitimate interest in regulating each profession by a distinctive set of standards. These standards are similar in some respects and different in others. Depending on the nature of the engagement, dual licensees must comply with one

set of standards, or the other, or both. Dual licensees can discern and conform to the applicable set of standards, in much the same way as attorneys engaged in the multistate practice of law can discern and conform to the standards of each applicable jurisdiction.

Although one set of standards governs attorneys and another set governs CPAs, a single pervasive principle applies with equal force to the regulation of each profession: The state should impose no restriction unless required by the public interest. When the regulation affects truthful speech, the applicable test is even more stringent: The state should impose restrictions only in narrowly defined situations and only in response to a demonstrated need to protect a substantial public interest.

In the decision in this case, the Florida Board of Accountancy reprimands Silvia Ibanez for truthfully identifying herself as an attorney, CPA and CFP (Certified Financial Planner). The Board's actions violate Ibanez's First Amendment rights and endanger the rights of all practitioners who hold more than one professional license. AAA-CPA supports the position of Ibanez in seeking this Court's review and reversal of the judgment of the Florida District Court of Appeal which, without opinion, affirmed the Board's decision.

SUMMARY OF ARGUMENT

I. THE BOARD USES AN INNOVATIVE RATIONALE FOR IMPAIRING IBANEZ'S FIRST AMENDMENT RIGHTS

II. THE BOARD'S DECISION ENDANGERS THE RIGHTS OF ALL INDIVIDUALS WHO HOLD MORE THAN ONE PROFESSIONAL LICENSE

ARGUMENT

In the decision at issue in this case, the Florida Board of Accountancy ("the Board") improperly reprimands Silvia Ibanez ("Ibanez") for truthfully identifying herself as an attorney, a Certified Public Accountant ("CPA"), and a Certified Financial Planner ("CFP").

Amicus curiae, the American Association of Attorney-Certified Public Accountants, Inc. ("AAA-CPA"), has been informed that the International Board of Standards and Practices for Certified Financial Planners, Inc. ("IBCFP") will file its own brief as amicus curiae, supporting Ibanez's right to identify herself truthfully as a CFP. AAA-CPA joins IBCFP in supporting her right to do so, based on commercial speech decisions such as *Peel v. Attorney Disciplinary Commission*, 496 U.S. 91 (1990) and *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792 (1993). To avoid needless overlap with the IBCFP brief, the present brief by AAA-CPA focuses on Ibanez's right to identify herself truthfully as an attorney and a CPA.

The Board improperly characterizes Ibanez's truthful identification, as an attorney and a CPA, as "deceptive, false and misleading." This characterization is based only

on the Board's speculation that Ibanez may violate the rules which, according to the Board, require her to license her law firm as a CPA firm, to forego certain forms of remuneration, and to limit the ownership of the firm to other CPAs. Pet., p. 11a. By characterizing truth as deception and by imposing discipline on this basis, the Board impairs Ibanez's First Amendment rights and endangers the rights of all practitioners who hold more than one professional license.

I. THE BOARD USES AN INNOVATIVE RATIONALE FOR IMPAIRING IBANEZ'S FIRST AMENDMENT RIGHTS

The Board's action is innovative and unprecedented. Although the Board's order cites a number of cases, none of them supports the Board's action. If allowed to stand, the Board's action will establish a dangerous precedent.

A. The Board characterizes Ibanez's truthful listing of professional credentials as "deceptive, false and misleading"

In its order reprimanding Ibanez, the Board acknowledges that she is licensed as an attorney and a CPA. The Board holds, however, that her truthful identification as an attorney and a CPA is "deceptive, false and misleading." Pet., pp. 11a-12a. This holding violates Ibanez's First Amendment right to engage in truthful commercial speech, for reasons discussed under the following headings.

B. The Board misapplies case law

The Board's order cites a number of cases in support of its action. None of them supports the Board's action.

1. This Court's cases on commercial speech

First, the Board relies on this Court's decisions in *Peel v. Attorney Disciplinary Commission*, 496 U.S. 91 (1990), *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557 (1980), and *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). For reasons stated in Ibanez's Petition for Certiorari, none of the above decisions supports the Board's action.

The Board's decision is further undermined by this Court's subsequent decision in *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792 (1993), also discussed in the Petition. To avoid needless overlap with the Petition, this brief will not further discuss these cases.

2. Other courts' cases on title acts

The Board relies also on a number of lower court decisions arising from statutes described as "title acts," which prohibit unlicensed persons from using professional titles. Pet., pp. 7a, 10a, 15a. None of these cases, however, supports the Board's position.

The Board relies on *Abramson v. Gonzales*, 949 F.2d 1565 (11th Cir. 1992) (state may prohibit unlicensed psychologist from identifying publicly as "licensed psychologist," but same individual has First Amendment right to identify publicly as "psychologist"); *Accountants' Society*

of Virginia v. Bowman, 860 F.2d 602 (4th Cir. 1988) (state may prohibit unlicensed accountant from identifying publicly as "certified public accountant," "CPA," or "public accountant"); *Smith v. California*, 336 F.2d 530 (9th Cir. 1964) (state may prohibit unlicensed engineer from identifying publicly as "electrical engineer" or "consulting engineer").

These three cases support the right of a state legislature to prohibit *unlicensed* persons from using certain professional titles. That proposition is not disputed in the present case. None of the cases relied on by the Board supports the right of the state to prohibit a *licensed* person from using her titles. Accordingly, the cases do not support the Board's order.

C. Ibanez's truthful listing of credentials is not a representation regarding the regulatory regime governing her practice

The Board explains why it characterizes Ibanez's truthful listing of her professional credentials as "deceptive, false and misleading." In essence, the Board's explanation has two components: (1) By publicly identifying herself as a CPA, Ibanez represents to the public that she will comply with all of the Board's rules; and (2) The Board speculates that Ibanez may violate some of its rules. In the Board's own words, Pet. p. 11a:

> Respondent [Ibanez] has, in effect, told the public that she is subject to the provisions of Chapter 473 [the Florida Accountancy Law], and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not [footnote omitted].

1. Truthful, not deceptive

The Board's explanation is untenable. By publicly identifying herself as a CPA, Ibanez merely represents that she now holds a valid license which authorizes her to use that title. Since the Board concedes that she holds a valid license, the Board has no basis for impairing her right to identify herself publicly as a CPA, or for characterizing her identification as deceptive. Her public identification is truthful.

2. Public identification, not representation regarding regulatory regime

Ibanez's public identification as an attorney and a CPA is not a representation regarding the regulatory regime governing her professional practice. Defining the appropriate regime may be a complex matter which cannot feasibly be conveyed by the listing of professional credentials.

For example, a person licensed as both an attorney and a CPA obviously may not serve the same client as both legal counsel and independent auditor, because of the different professional roles of counsel (as advocate and adviser) and auditor (as independent examiner). The dual licensee must therefore decline to accept engagements that would violate this principle, while remaining free to accept the wide range of other engagements in which attorney-CPAs may properly and usefully serve their clients. But the need to decline certain engagements has no bearing on the right of a person licensed as both an attorney and a CPA to use these credentials as a means

of public identification. A dual licensee is not required to describe the need to decline certain engagements when publicly listing professional credentials.

Dual licensees face other issues, some of them even more complex. One source of complexity arises because in Florida, as in virtually all states, attorneys are regulated by the state Supreme Court while CPAs are regulated by the Board, an administrative agency. In the event of conflict between these two sources of regulation, issues may arise under the separation of powers provision of the state constitution. The potential emergence of these issues, however, has no bearing on Ibanez's right to identify herself truthfully as an attorney and a CPA. And in listing her professional credentials, Ibanez need not describe or discuss these issues.

D. The Board improperly bases its decision on speculation that Ibanez may violate its rules

The Board's order speculates that Ibanez may violate its rules. Mere speculation, however, is not a sufficient justification for restricting Ibanez's commercial speech.

If the Board has sufficient reason to do so, it may bring formal charges against Ibanez, accusing her of past or continuing violations of specific rules. She will then receive the elaborate procedural protections of the Florida Administrative Procedure Act as well as the due process guarantees of the state and federal constitutions. In these proceedings she will have the opportunity to raise her defenses, including any appropriate challenge to the Board's jurisdiction to enforce its rules against a CPA who is not engaged in the practice of public accounting.

If the Board finds, in such proceedings, that Ibanez has indeed violated specific rules, the Board may impose the discipline authorized by statute, subject to judicial review. If that discipline consists of the revocation of her license, she will then be prohibited from identifying herself as a CPA. Until then, Ibanez is a CPA and is entitled to identify herself as one.

II. THE BOARD'S DECISION ENDANGERS THE RIGHTS OF ALL INDIVIDUALS WHO HOLD MORE THAN ONE PROFESSIONAL LICENSE

The Board's decision, affirmed without opinion by the District Court of Appeal, poses a significant danger to the First Amendment rights of all individuals who hold more than one professional license, in Florida and throughout the United States.

A. The Board's decision will receive wide publicity, although the Florida appellate court affirmed without opinion

1. Channels of publicity

The Board's decisions, like those of other Florida administrative agencies, are published and available to the media and the general public. The Board publishes "Quarterly Statement," a newsletter reporting information of interest to CPAs, including summaries of the Board's disciplinary actions.

The Board is affiliated with the National Association of State Boards of Accountancy ("NASBA"), which serves as a clearinghouse for information and ideas of general concern to state boards. Through NASBA and other networks, the Board's action in this case is likely to come to the attention of boards in other states.

The Florida Institute of Certified Public Accountants ("FICPA"), a voluntary organization, publishes its own newsletter, "Florida CPA Today." This publication has already prominently featured the issue raised in this case. Lloyd "Buddy" Turman (FICPA Executive Director) & Kenneth R. Hart (FICPA General Counsel), *When You Say You're A CPA, You Must Play By The Rules . . . All The Rules*, FLORIDA CPA TODAY, Oct. 1992, at 8 (reprinted, with permission of FICPA, in 29 THE ATTORNEY-CPA, No. 1, Winter 1993, at 6).

FICPA is affiliated with the American Institute of Certified Public Accountants ("AICPA") and many Florida CPAs are members of AICPA. News of the Board's action is likely to circulate throughout the AICPA.

Further, many Florida CPAs practice in offices that are affiliated with national firms. These firms provide additional channels for the spread of news about the Board's action in this case.

2. The Board's reputation for repression

The Board's decisions on commercial speech issues are likely to attract nationwide attention, since the Board has a reputation for trying to repress truthful communications by CPAs. The Board has lost a number of cases in

this area, including *Edenfield v. Fane, supra* (Board's anti-solicitation rule held invalid as applied to truthful, non-coercive solicitation in the business context); *Dep't. of Professional Regulation, Board of Accountancy v. Rampell*, 621 So.2d 426 (Fla. 1993) (Board's anti-competitive bidding rule held invalid); *Cenac v. Florida State Board of Accountancy*, 399 So.2d 1013 (Fla. 1st Dist. Ct. App. 1981) (Board's revocation of CPA's license reversed, since Board did not explain its rejection of findings by hearing officer on question whether accountant had held out as a CPA – noted in Board's order, Pet. p. 8a, n. 3); *Ibanez v. State Board of Accountancy*, Fla. Div. of Admin. Hearings, Case No. 91-3336R (Jan. 15, 1992) (Board's "holding out" rule invalidated, by independent hearing officer, as arbitrary and capricious – noted in Board's order, Pet. p. 8a, n. 4).

B. The Board's decision is likely to encourage other regulators to repress public identification or practice by individuals who hold more than one professional license

The Board's decision, if allowed to stand, is likely to affect the rights of attorney-CPAs and other individuals who hold more than one professional license.

1. Attorney-CPAs

During the 29 years of AAA-CPA's existence, attorney-CPAs have faced restrictions on their right to practice and their right to identify their professional credentials. Until 1980, the restrictions came primarily from the American Bar Association ("ABA"). Since then, the

restrictions have come from the accountancy boards of a few states, including Florida.

AAA-CPA's quarterly newsletter, "The Attorney-CPA," documents this history in considerable detail. The following discussion mentions some highlights.

Restrictions imposed by ABA

Starting in 1932, ABA interpretations of the 1908 Canons of Professional Conduct prohibited attorneys from engaging in other businesses. ABA Informal Op. 1422 (1978) (historical summary). The clear purpose of these prohibitions was to prevent the non-law business from "feeding" clients to the law practice. Many states chose to ignore the ABA's position on this issue.

The ABA adopted the Model Code of Professional Responsibility in 1969 (effective January 1, 1970). The Model Code included a Disciplinary Rule, DR 2-102(E), representing a significant departure from the ABA's prior position. DR 2-102(E) allowed an attorney to engage in another profession or business, subject to one proviso – the lawyer could not identify the other business or profession on the letterhead, office sign or professional card of the law practice, nor could the lawyer be identified as a lawyer in any publication in connection with the other business or profession. Thus the ABA Model Code permitted dual practice but prohibited identification as a dual practitioner.

In 1977 this Court decided *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), conferring First Amendment protection on certain types of advertising by lawyers. In the aftermath of *Bates*, the ABA overhauled its rules on

advertising. At first DR 2-102(E), prohibiting identification as a dual licensee, was left intact. In 1980, however, the ABA repealed DR 2-102(E), apparently in the belief that the rule was incompatible with *Bates*. Proceedings of ABA 1980 Mid-Year Meeting, 105 ABA ANNUAL REPORTS 287, 341 (1985).

The ABA Model Rules of Professional Conduct, adopted in 1983 to replace the Model Code, include no prohibition against identification as dual licensee. ABA Informal Op. 83-1497, n. 2 (1983) (commenting on this aspect of the then-pending Model Rules).

State courts and bar committees have adopted the permissive stance now taken by the ABA. During the past decade, dual licensees have encountered few if any restrictions from bar regulators. Significantly, The Florida Bar has not objected to Ibanez's identification as CPA and CFP in the telephone yellow pages under the heading "Attorneys." Only the Florida Board of Accountancy objects; the Board's reprimand precipitated the present lawsuit.

Restrictions imposed by accounting regulators

In 1946, the American Institute of Accountants ("AIA," predecessor of AICPA) endorsed the right of attorney-CPAs to practice both professions. American Institute of Accountants, Committee on Professional Ethics, *Official Text*, May 8, 1946, 83 J. ACCTCY. 171 (1947). At the time, AIA prohibited CPAs from advertising, as did state boards and voluntary societies of CPAs throughout the country.

After *Bates*, states could no longer prohibit advertising. The Florida Board then developed a new theory in

the hope of restricting dual practice or identification of dual credentials without running afoul of *Bates* and this Court's later cases on commercial speech.

According to the Board's new theory, a CPA who publicly "holds out" that credential thereby engages in the "practice of public accounting," and is consequently governed by all the Board's rules. While the present case was pending before the Board, an independent hearing officer in separate proceedings held the Board's "holding out" rule invalid. *Ibanez v. State Board of Accountancy, supra*. The Board then abandoned its reliance on the "holding out" rule. Instead, the Board characterized Ibanez's listing of her credentials as "deceptive," based on the Board's speculation that she might violate some of the Board's rules.

The Board's position in the present case is innovative and unprecedented. Many states, however, have adopted their own "holding out" rules, to the effect that a CPA who holds out this credential thereby engages in the practice of public accountancy. The Uniform Accountancy Act, drafted in 1992 by AICPA and NASBA, includes a "holding out" rule similar to Florida's. American Institute of Certified Public Accountants & National Association of State Boards of Accountancy, *Uniform Accountancy Act*, Section 3(g) (1992), 1 C.C.H. ACCOUNTANCY L. RPTR. par. 1035 (looseleaf). The Uniform Act is now under serious consideration in many states.

If the Board's interpretation of the Florida "holding out" rule is allowed to stand, regulators wishing to repress speech in other states may engraft a similar interpretation on their version of the "holding out" rule, or

AICPA and NASBA may even insert a similar interpretation in the Uniform Act.

2. Other multiple licensees

This brief has focused on the individual who is dually licensed as an attorney and a CPA. The significance of the present case goes further, and extends to any individual who is licensed in more than one profession.

The ABA's restrictions on dual practice (until 1970) and dual identification (until 1980) applied to lawyers who engaged in *any other* business or profession. See, for example, ABA Informal Op. 1248 (1972) (lawyer-psychologist), ABA Informal Op. 83-1497 (1983) (lawyer-physician), ABA Informal Op. 1422 (1978) (identification of lawyer in a publication about another profession or business); ABA 1980 Mid-Year Proceedings, *supra* (lawyer-Ph.D.). While the ABA no longer imposes these restrictions, this history illustrates various other professions in which lawyers have engaged. The present case is also relevant to non-lawyers who are licensed in two or more professions.

Any person who has the talent, persistence and integrity to qualify for two or more professional licenses, and to retain these licenses in good standing, is put at risk by the Board's decision in the present case. The public interest is served by allowing individuals who hold multiple licenses to practice each profession in

which they are licensed, and to convey truthful information about their credentials.*

The Board's decision, repressing truthful identification of professional credentials, is contrary to the public interest and impairs First Amendment rights. The decision should be reversed.

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* See, for example, Philip D. Brent, *Accounting and Law: Concurrent Practice Is In the Public Interest*, 123 J. Acctcy., Mar. 1967, at 38; Louis S. Goldberg, *Dual Practice of Law and Accountancy: A Lawyer's Paradox*, 1966 Duke L. J. 117; Louis S. Goldberg, *A Lawyer's Multiple Occupations*, 6 Wake Forest Intramural L. Rev. 191 (1970); Morris W. Primoff, *The Dual Practice of Law and Accounting and the Public Interest* (Ph.D. dissertation, Calif. Western Univ., 1977, published by AAA-CPA).

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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November 18, 1993

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